

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA  
JOHNSTOWN DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, ) CASE NO: 3:14-cr-00023  
 )  
vs. )  
 )  
JOSEPH D. MAURIZIO, JR., )  
 )  
Defendant. )  
\_\_\_\_\_ )

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS  
BEFORE THE HONORABLE KIM R. GIBSON  
FEBRUARY 2, 2016

**FOR THE GOVERNMENT:**

Stephanie L. Haines, AUSA  
Amy Larson, AUSA  
United States Attorney's Office  
Penn Traffic Building, Ste. 200  
319 Washington Street  
Johnstown, PA 15901

**FOR THE DEFENDANT:**

Steven P. Passarello, Esq.  
Daniel Kiss, Esq.  
Law Office of Steven P. Passarello  
616 Hileman Street  
Altoona, PA 16601

Proceedings recorded by mechanical stenography,  
transcript produced with computer.

\_\_\_\_\_  
Kimberly K. Spangler, RPR, RMR  
United States District Court  
Penn Traffic Building, Ste. 204  
319 Washington Street  
Johnstown, PA 15901

I N D E X

FEBRUARY 2, 2016

Defense Argument  
By Mr. Passarello 6, 25

Government Argument  
By Ms. Larson 14

Certificate of reporter 43

\* \* \*

P R O C E E D I N G S

(The proceedings convened on February 2, 2016, commencing at 10:00 a.m.)

THE COURT: Good morning. This is the time and place set for defendant Joseph D. Maurizio's motion for a new trial based upon newly discovered evidence and an alleged violation of *Brady v. Maryland*, a Supreme Court case. This is Criminal Number 14-23.

The newly discovered evidence submitted by defendant is a statement by Erick in a victim impact statement dated September 20, 2015. The Third Circuit Court of Appeals has consistently held that a defendant must meet five requirements before he may be granted a new trial on the basis of newly discovered evidence.

First, the evidence must be, in fact, newly discovered. In other words, discovered since the trial.

Second, the facts must be alleged from which the Court may infer diligence on the part of the movant.

Third, the evidence relied upon must not be merely cumulative or impeaching.

Fourth, the evidence relied on must be material to the issues involved.

And, fifth, the evidence relied on must be such, and of such nature, as that on a new trial the newly discovered evidence would probably produce an acquittal.

1           These requirements are set forth in the *United*  
2     *States v. Iannelli* 528 F.2d 1290, a 1976 Third Circuit Court  
3     of Appeals case, and are routinely referred to as the *Iannelli*  
4     requirements.

5           Although the decision to grant or deny a motion for  
6     a new trial lies within the discretion of the District Court,  
7     the movant has a heavy burden of proving each of these  
8     requirements. If just one of these requirements is not  
9     satisfied, a defendant's Rule 33 motion must fail. Courts  
10    should exercise great caution in setting aside a verdict  
11    reached after a fully-conducted proceeding, and particularly  
12    so where the action has been tried before a jury.

13          In your presentations, I urge each party to  
14    concentrate on the third and the fifth *Iannelli* requirements.  
15    The third requirement is that the evidence relied on must not  
16    be merely cumulative or impeaching. The fifth requirement is  
17    that the evidence relied on must be such, and of such nature,  
18    as that on a new trial the newly discovered evidence would  
19    probably produce an acquittal.

20          With regard to the motion for new trial based upon  
21    an alleged Brady violation, pursuant to *Brady v. Maryland*, a  
22    United States Supreme Court case, the government must provide  
23    a defendant with exculpatory material, including impeachment  
24    material that it either possesses or could obtain through due  
25    diligence.

1           To establish a *Brady* violation sufficient to  
2 warrant a new trial, a defendant must show, first, that the  
3 evidence was suppressed. Second, that the suppressed evidence  
4 was favorable to the defendant and, third, that the suppressed  
5 evidence was material either to guilt or to punishment.

6           Evidence is material when there is a reasonable  
7 probability that had the evidence been disclosed to the  
8 defense, the result of the proceeding would have been  
9 different. Reasonable probability is a probability sufficient  
10 to undermine confidence in the outcome.

11           A showing of materiality does not require  
12 demonstration by a preponderance that disclosure would have  
13 resulted ultimately in the defendant's acquittal. Rather, the  
14 defendant must show that the favorable evidence could  
15 reasonably be taken to put the whole case in such a different  
16 light as to undermine confidence in the verdict.

17           In determining whether the defendant has  
18 established materiality, a court must evaluate the cumulative  
19 effect of the undisclosed evidence.

20           In your presentations, I urge each party to  
21 concentrate on whether the evidence was material either to  
22 guilt or to punishment.

23           Originally, this day was scheduled for sentencing  
24 in this case. However, before the Court may move to  
25 sentencing, the issues before the Court with regard to motion

1 for new trial must be resolved. Since the parties were set to  
2 be here today in any event, I scheduled the evidentiary  
3 hearing in this case for today rather than pushing it back to  
4 a later date.

5 Are the parties ready to proceed?

6 MS. LARSON: Yes, Judge.

7 MR. PASSARELLO: Yes, Your Honor.

8 THE COURT: Mr. Passarello, this is your motion and  
9 I will permit you to make presentation first.

10 MR. PASSARELLO: Thank you, Your Honor.

11 May it please the Court, Counsel. First off, Your  
12 Honor, I apologize for my voice if it breaks up. I've been  
13 sick for about four days, so I'm trying to get over it.

14 THE COURT: As long as we can hear you that will be  
15 fine.

16 MR. PASSARELLO: Okay.

17 This Court has laid out clearly what the issues  
18 are, and I will address those the Court has requested. The  
19 first motion before the Court is newly discovered evidence  
20 under Rule 33. The Court has asked me to focus on whether  
21 it's not merely cumulative or impeaching, and whether this  
22 evidence is such a nature that it would probably produce a  
23 different result at trial.

24 If the Court reads Rule 33 -- well, first let's  
25 look at the statement. The statement is a statement from one

1 of the linchpins of the United States' case, that being victim  
2 Erick. The whole entire case was a credibility case; would  
3 the jury believe the victims, the boys, or would they not. It  
4 clearly came down to credibility, and that is even addressed  
5 in Attorney Haines' closing argument.

6 The statement says this in answer to a question:  
7 The question is, "Do you relate to people differently since  
8 the crime. Please explain." Answer by Erick in his  
9 handwriting in Spanish, and then translated correctly: "Yes.  
10 Sometimes they think badly about me. Perhaps they think he  
11 really abused me, but that was not the case."

12 That statement taken on its face is a contradiction  
13 to his testimony at trial, and clearly goes to his  
14 credibility.

15 Now let's talk about whether it's merely  
16 impeachment. If you look at the rule, Rule 33 indicates the  
17 fact that newly discovered evidence goes to impeachment does  
18 not mean that it cannot serve as the basis for a new trial.  
19 The real question to be asked is, is there a strong  
20 exculpatory connection between the newly discovered evidence  
21 and the evidence presented at trial. Or does the newly  
22 discovered evidence, though not in itself exculpatory -- which  
23 I would argue that this is -- throws severe doubt on the  
24 truthfulness of the critical inculpatory evidence that had  
25 been introduced at trial.

1           That's what this statement is. It is more than  
2 being impeachment, it's exculpatory. But even if the Court  
3 thinks it's simply -- it clearly causes severe doubt on  
4 critical and inculpatory evidence at trial.

5           And how do we know that? How do we know that?  
6 Attorney Haines in her closing argument, in her rebuttal  
7 closing argument, said what? "Well, Mr. Passarello, he  
8 cross-examined Otoniel, he cross-examined Fredis, he  
9 cross-examined this guy and that guy. But he didn't  
10 cross-examine Erick, and that's on them." That's what she  
11 said. And she said, "You want to know why?" A quote from  
12 rebuttal: "Because Erick told you what happened, he told you  
13 the truth."

14           This evidence clearly goes to that inculpatory  
15 evidence that she tried to present. And it clearly  
16 contradicts that. Erick was their linchpin because we didn't  
17 have anything to cross-examine him on. He was their big  
18 witness. He corroborated allegedly Otoniel, much more than  
19 Luis did.

20           And to come in and then after trial in the  
21 testimony and under oath say, "Perhaps they think he abused me  
22 but he did not," I think clearly is newly discovered evidence  
23 that would command a new trial.

24           What they did here, Judge, what they did, is they  
25 usurped your role. They took a bullet from my defendant's gun



1 to constitutionally confront his witness and, more  
2 importantly, took away the jury's role on a critical piece of  
3 evidence to determine credibility. And I submit to the Court  
4 that by them doing that -- if the jury had heard that evidence  
5 -- now, I can't tell you, Judge, 110 percent if the jury had  
6 heard that evidence they would have changed their mind. But I  
7 can tell you this: The whole defense was "you believe him or  
8 you don't." That piece of evidence would cause doubt as to  
9 Erick's credibility.

10 Now, they can explain away all they want, well, you  
11 know what, Judge, that's not what he meant by abuse. You know  
12 what, Judge, we took another statement in November that  
13 changes that statement. That's irrelevant to this inquiry.  
14 They could have presented all that to the jury and the jury  
15 could have bought it. But the jury also could have bought  
16 that Erick was not telling the truth. And I submit, based  
17 upon newly discovered evidence, that it commands a new trial.

18 Second argument is the *Brady* argument which, in all  
19 fairness to this Court, I think is the strongest argument. It  
20 is clear that the United States government had this statement  
21 on September 20th, 2015, and did not advise the Court of it  
22 nor did they advise the defense counsel.

23 It is also crystal clear from their supplemental  
24 response, that they were so kind to have filed at 4:37  
25 yesterday afternoon, that they were concerned about it.

1 Because if you read the affidavit, they got the statement,  
2 they read it, the prosecution team called Agent Gamarra to  
3 come and say, hey, what the heck is this statement. Agent  
4 Gamarra basically thinks it's a translation issue, we'll fix  
5 it, realizes it's not. And Agent Gamarra is there sometime  
6 between September 20th and the 22nd, before the verdict comes  
7 in. They're so concerned they send Agent Gamarra to the hotel  
8 to talk to Erick. To say, Erick, what the heck do you mean?  
9 What's going on here?

10 And all the while, we're getting ready to close,  
11 they say nothing. We close before the charge, they say  
12 nothing. You charge, you ask the defense counsel and the  
13 United States, anything for the record, they stand mute. They  
14 sit there and let the jury deliberate for two days, say  
15 nothing. They sit there and listen to the verdict, say  
16 nothing.

17 And why do they tell this Court they say nothing?  
18 Because they determined that it wasn't Brady material. Well,  
19 you know what? That ain't their call. That's not their call.  
20 This evidence is clearly, clearly Brady material.

21 And how else do we know that they were so concerned  
22 about this statement? For some reason in the affidavit they  
23 filed, they sent Agent Gamarra in Honduras from Tegucigalpa to  
24 San Pedro Sula -- five hours -- on November 4th I believe,  
25 2015, to take a new victim impact statement from Erick -- a

1 statement that I have yet to even see -- to get a,  
2 quote/unquote, more accurate answer to that question. And the  
3 more accurate answer now is, How does it make you feel? Well,  
4 yes, perhaps people think he abused me, but that's because I  
5 put him in jail.

6 Really? Are you kidding me?

7 Evidence. First of all, I want to address the  
8 issue that they claim it's not Brady material, okay. That's  
9 absurd, okay. They mock me in their response by saying, well,  
10 I have no authority to cite this and I don't cite that.

11 Well, you know, *Brady* and *Giglio* are pretty well  
12 known to everybody, but if they need a refresher course here's  
13 some authority. Evidence is -- it's Brady material -- *Brady*  
14 requires the government to provide evidence favorable to the  
15 accused. For *Brady* purposes, "evidence is favorable to the  
16 accused if it is either exculpatory or impeachable. See  
17 *Strickler*." Which this evidence is both.

18 "If the information would be advantageous to the  
19 defense it is favorable to the accused. See *Banks v. Dretke*,  
20 540 U.S. 668. Or if the evidence would tend to call the  
21 government's case into doubt it is favorable."

22 "Evidence is favorable that is a question of  
23 substance and not degree. And evidence that has any  
24 affirmative evidentiary support for the defendant's case or  
25 any impeachment value is by definition favorable and Brady

1 material. See *Strickler*."

2 This evidence was not only impeaching but also was  
3 clearly favorable to the accused, and it clearly constitutes  
4 Brady material.

5 That doesn't end the inquiry. Was it suppressed?  
6 I think clearly it was. It wasn't given. And they had  
7 knowledge of it and chose not to provide it.

8 So now we get to the crux. Was it material? "The  
9 suppression of evidence is prejudicial if the evidence was  
10 material for *Brady* purposes. Evidence is material if it could  
11 reasonably be taken to put the whole case in such a different  
12 light as to undermine the confidence in the verdict. See  
13 *Kyles v. Whitley* 514 U.S. 419."

14 "To establish materiality, a defendant need not  
15 demonstrate that the disclosure of the suppressed evidence  
16 would have resulted ultimately in his acquittal. A reasonable  
17 probability exists if the government's evidence undermines  
18 confidence in the outcome of the trial. See *Bagley*."

19 "In evaluating materiality, we must focus on  
20 whether the withholding of the evidence undermines our trust  
21 in the fairness of the trial and the resulting verdict."

22 The Supreme Court case law also instructs that  
23 likely damage from suppression of evidence is best understood  
24 by reference to a prosecutor's closing argument.

25 This evidence is clearly material for *Brady*

1 purposes. It is a statement from a victim who testified in  
2 this trial, in his own handwriting and signed under  
3 declaration of perjury, that indicates the defendant did not  
4 abuse him. Done after he had already testified at trial that  
5 he committed those acts.

6 We know it was material because it was of such a  
7 concern to the government that they had Agent Gamarra go to  
8 the hotel and figure out what was going on. They had him then  
9 take another statement in Honduras on November 4th to change  
10 it to make it more accurate.

11 We also know that under the case law -- I ask the  
12 Court to look at the case law -- but when the case rises or  
13 falls on the credibility of witnesses, and when this witness  
14 is the linchpin of their case, it clearly makes that type of  
15 evidence material.

16 Again, the Supreme Court says look at the closings  
17 to know if it's material. Attorney Haines specifically said,  
18 "They cross-examined everybody, but they didn't cross-examine  
19 him, and that's on them. And why? Because he told you the  
20 truth." I can guaran-damn-tee you if I had that statement I  
21 would have crossed him, and the jury would have been allowed  
22 to hear it.

23 They usurped your authority. They took a bullet  
24 from my gun. And they took the jury's determination of  
25 credibility by not providing this statement.

1 I submit respectfully, Your Honor, that based upon  
2 -- look, sometimes things are just what they are. It is what  
3 it is, okay. And what this is is, you know, sometimes what's  
4 right is right and what's wrong is wrong. No matter how you  
5 slice it, this is wrong.

6 They should have given it to us. They should have  
7 at least made you aware of it. What was the harm? They could  
8 have called their agents to say, now, that's what Erick meant.  
9 They could have explained to the jury he doesn't understand  
10 what abuse means, or he changed his statement. But they took  
11 away from me the right to challenge his credibility and argue  
12 to that jury that he was not telling the truth. And that was  
13 my whole defense.

14 I don't care how you slice it. And I understand  
15 that -- obviously, I think I've laid out the arguments for  
16 this Court -- but what's right is right and what's wrong is  
17 wrong. And this is just plain wrong.

18 Thank you.

19 THE COURT: For the United States.

20 MS. LARSON: Good morning, Judge. As the Court  
21 noted as we started here today, this is the defendant's burden  
22 on both of the issues that he now advances before the Court.  
23 Both whether or not there was, in fact, a Brady violation and  
24 the much more onerous standard of, if so, whether or not he's  
25 entitled to a new trial based on this or based upon what he

1 asserts is newly discovered evidence.

2 Now, he's failed to meet his burden here on either  
3 of the arguments he raises today because he's failed to offer  
4 any support for what he is offering to the Court. For his  
5 interpretation of what a single statement taken completely out  
6 of context of a five-page document, which he conveniently  
7 ignores the substance of that statement, what that means.  
8 Again, without any evidence that he's placed in the record  
9 that supports any of his arguments that he makes before the  
10 Court today.

11 It should also be noted that it was not the  
12 defendant who asked for an evidentiary hearing today, but  
13 rather the Court who suggested it and, in fact, set it for a  
14 hearing today.

15 So when we boil this down what do we have, Judge?  
16 We have a single statement which Mr. Passarello read into the  
17 record, taken completely out of context in which it was given.  
18 In his pleadings there's absolutely no factual support for his  
19 assertion that this is, in fact, a recantation by one of the  
20 government's victims, or that he has changed his testimony in  
21 any sort of material way.

22 There's absolutely no basis for any of his  
23 assertions or for any of him standing up here and  
24 pontificating and, quite frankly, repeatedly pointing at the  
25 prosecution table in a manner that's inappropriate and

1 unprofessional.

2 But what did Mr. Passarello have in the discovery  
3 materials prior to the start of the trial, which were turned  
4 over on September 4th in a production of Jencks material, as  
5 well as any and all outstanding discovery materials? He had  
6 materials which directly contradict the argument he's asking  
7 this Court to swallow without any support, and which  
8 corroborate the sworn affidavits which have been submitted by  
9 the two government witnesses; that being Jackie Goldstein and  
10 Special Agent Carlos Gamarra. He had in his position an ROI,  
11 Number 79, which was produced to him on September 4th -- which  
12 was days before the trial started, days before any of the  
13 witnesses testified -- regarding an interview conducted with  
14 the victim witness, who in that ROI is referred to as Number  
15 Four, but he's clearly victim minor Number Three, who is  
16 Ludin.

17 And the allegations that were the basis of the  
18 charges related to Minor Victim Number Three are Counts 4 and  
19 5 of the indictment. And that was based on allegations made  
20 by Ludin that on at least two occasions -- once when he was 15  
21 and once when he was 16 -- he was anally penetrated by the  
22 defendant, as well as on witness statements, such as Luis and  
23 others, that they had observed Ludin anally penetrating the  
24 father.

25 Now, as this Court is well aware, by the time Ludin



1 came to court to testify, the defendant's investigator had  
2 already prompted what the government argued was a false  
3 recantation through their videotaped interview of him,  
4 repeated interviews, where they only produced a portion of  
5 that to the government.

6           So when he was questioned by the government on  
7 September 1st, 2015, Ludin made a statement that, "I never  
8 abused Maurizio the priest, and he never abused me." In that  
9 context "abuse" is anal penetration. "I never abused him, he  
10 never abused me." Those were the allegations with respect to  
11 that victim. Which is very different than the allegations  
12 that were ever in play with respect to Minor Victim Number  
13 Two, Erick.

14           So he had this information which, once again,  
15 retrial completely undercuts the whole argument he asks the  
16 Court to swallow, and corroborates all of the statements that  
17 are in the government's original response with Jackie  
18 Goldstein's affidavit, sworn affidavit, as well as in our  
19 supplemental response in the affidavit of Carlos Gamarra.

20           So turning first, Judge, there was absolutely no  
21 factual support for the defendant's argument that there was a  
22 *Brady* violation here. Again, nothing in the record before  
23 this Court that meets either of the requirements necessary for  
24 a *Brady* violation.

25           Again, the disclosure of a single statement in a

1 five-page victim impact statement, which was based on a  
2 misunderstanding regarding a nonlegal, ambiguous, broad term  
3 such as "abuse" is simply not -- when coupled with all of the  
4 remaining statements in the victim impact statement -- again  
5 four pages worth -- in which Erick methodically details the  
6 impact of the crimes which the defendant perpetrated against  
7 him. Which is the sole purpose of a victim impact statement,  
8 not evidence of the defendant's guilt, to discuss the impact  
9 of the crime on the victim, which he did.

10 He outlines how the crime has, in fact, affected  
11 him and his family, how people are thinking. Or he's worried  
12 people think he's gay, which is again corroborated by all of  
13 the other testimony, including the experts on both sides of  
14 this case. But that's a very real fear when young boys are  
15 assaulted by adult male perpetrators.

16 And again he discusses the fear, the grief, the  
17 depression, the repeated memories of the crime, as well as the  
18 ongoing emotional consequences he's suffered by the  
19 defendant's criminal conduct perpetrated against him.

20 So when you take that entire five-page statement  
21 it's clearly not favorable evidence to the defense. But even  
22 if the Court were to find that the evidence were favorable to  
23 the defense, there's no Brady violation because under the  
24 standard it is simply not material. Evidence is material only  
25 if there's a reasonable probability, as the Court has noted,

1 that had it been disclosed the result of the proceeding would  
2 have been different.

3 Again, it's the defendant's burden of showing this  
4 reasonable probability of a different outcome, one that is  
5 sufficient to undermine the confidence in this verdict. And  
6 there's absolutely no factual support for his assertions that  
7 had this victim impact statement been produced and the one  
8 statement at issue had been disclosed that the trial would  
9 have ended in an acquittal.

10 In order to make that finding of fact, in order to  
11 make the conclusions of law that would require this Court to  
12 ignore or overlook or otherwise disregard far, far too many  
13 things, you would have to read that one statement, Judge, in a  
14 vacuum and ignore the rest of Erick's victim witness statement  
15 that are contained within the four corners of that document.  
16 You would have to find the sworn statements in the affidavits  
17 of Jacqueline Goldstein and Carlos Gamarra not credible and  
18 not part of the record. You would have to find that this  
19 ambiguity and what abuse means, and the fact that it is open  
20 to interpretation was not immediately rectified by the  
21 prosecution, that we were determined to make that decision,  
22 and that there was, in fact, no Brady material. It was not  
23 exculpatory, nor was it *Giglio*, nor was it anything different  
24 than what Erick has consistently alleged since 2009, when  
25 these allegations first arose.

1           The Court would have to ignore the entirety of  
2       Erick's sworn unchallenged, uncontroverted testimony at trial,  
3       as well as all of the corroborated evidence of all of the  
4       other government witnesses.

5           Remember, Judge, they can call him a linchpin.  
6       They can call him whatever they would like. He's a victim.  
7       He's a victim of illicit sexual conduct perpetrated against  
8       him by the defendant when he was only 15 years old.

9           But he was not the only witness to that conduct.  
10      Luis testified he viewed the defendant fondling Erick's  
11      genitals. Erick's always maintained that that's exactly what  
12      happened, and both affidavits before the Court indicate that  
13      he has never once recanted those allegations nor has he  
14      changed his allegations of the acts perpetrated against him by  
15      the defendant at all. Not at all during the pendency of this  
16      investigation or prosecution.

17           The Court would also have to overlook the forensic  
18      evidence in this case, including the images found on his  
19      computer, which a jury determined were child pornography. As  
20      well as all the EXIF data showing that the defendant  
21      repeatedly photographed these children in various states of  
22      undress, including holding their shirts up because he directed  
23      them to do so -- Erick testified to that -- to expose their  
24      chest, to expose their abdomen.

25           The Court would have to overlook all of the

1 photographic evidence that led up and exactly corroborated  
2 Erick and Luis's testimony of the events of the day that lead  
3 to the defendant's criminal conduct perpetrated against not  
4 one but two minor victims.

5           The Court would have to ignore the testimony of  
6 both expert witnesses, which corroborated the victim's  
7 testimony in various aspects about the way in which they  
8 reacted to the sexual abuse that they suffered, as well as all  
9 the documentary evidence, the defendant's travel records, his  
10 passports, all physical evidence recovered from his home, as  
11 well as various stipulations that are in evidence, and the  
12 defendant's own statements made in e-mails that he was not  
13 worried about sexual abuse allegations, not because they  
14 hadn't occurred but because he was convinced he'd get away  
15 with it because the victims, by that point, would be over the  
16 age of 18. We've cited that trial exhibit for the Court's  
17 consideration.

18           Given that the defendant has failed to meet his  
19 burden showing that this is in no way material evidence  
20 because there's no way that the disclosure of one single  
21 statement would have drastically altered or given a reasonable  
22 probability for acquittal here, he has not made his burden and  
23 so that motion at least with respect to the Brady allegation  
24 should be denied.

25           As the Court has cited, because he can't meet the

1 materiality under *Brady*, he also cannot prevail under the  
2 requirements for a new trial for newly discovered evidence.  
3 As the Court has noted, this is an even more stringent  
4 standard, a heavy burden for the movant, which he has simply  
5 failed to meet.

6           He must prove all of the five requirements. And  
7 again, he asserts absolutely no factual support, nothing in  
8 the record to show that this newly discovered evidence, which  
9 again, is one statement, one in a multi-page document, that  
10 includes tons of inculpatory answers and information provided  
11 by the victim, how that in any way would change the outcome of  
12 this trial and that there would be a probability of an  
13 acquittal.

14           As the Court's noted, he fails to establish at  
15 least three of the requirements necessary for a new trial.  
16 We've addressed materiality. But first the fact that Erick  
17 responded the way he did to that single question, based on an  
18 erroneous belief to an ambiguous nonlegal term such as  
19 "abuse," that that did not, in fact, include touching where  
20 Erick believed that that only included anal penetration,  
21 that's impeachment evidence at best. At best it's impeachment  
22 evidence. So under the progeny of case law that is not  
23 sufficient to warrant the defendant a new trial.

24           And he's not provided, again, a shred of factual  
25 support for that final requirement that that newly discovered

1 evidence, which again boils down to one single sentence, is of  
2 such nature that it would have produced an acquittal at trial.

3 Again, Judge, when you take this sentence in the  
4 context in which it was given, when it was given, all of the  
5 other answers given by Erick, it is completely clear that  
6 Erick was victimized by this defendant.

7 You have the affidavit of Jackie Goldstein saying  
8 at no point did she consider this to be a recantation because  
9 it was consistent with Erick's distinction between anal  
10 penetration and the abuse the defendant perpetrated against  
11 the other boys, and what he had experienced, which to Erick,  
12 what he disclosed, what he testified to at court, was simply  
13 fondling of the genitals. Erick drew that distinction.

14 That was then verified on the day after the  
15 statement was produced by Carlos Gamarra, who again went to  
16 clear up any possible ambiguity of the term "abuse." That was  
17 the sole purpose of that. And he did so. Again, Erick stated  
18 to Carlos Gamarra -- which you have a sworn affidavit -- that  
19 he did not understand that the term "abuse" could include  
20 touching, that he defined it as solely penetration. Which as  
21 we've now established, Ludin did as well.

22 Again, the testimony of Erick -- while  
23 Mr. Passarello wants to call him a linchpin -- of course he  
24 was an important piece of the puzzle. He testified about the  
25 acts of sexual contact that he suffered at the hands of the

1 defendant, the various illicit sexual conduct that he endured,  
2 which the defendant offered him and, in fact, gave him money  
3 to perpetrate against this young boy. His testimony again is  
4 buttressed by all the other evidence in this case. This does  
5 not stand alone. There was a witness to this abuse. There  
6 was photographic evidence. There was forensic evidence on the  
7 computer. All of those things which buttress Erick's  
8 testimony.

9           So it seems clear that the defendant's motion for a  
10 new trial based on this newly discovered evidence must be  
11 denied as well, Judge. So for all of these reasons we would  
12 ask that you deny both of the defendant's motions, as he has  
13 clearly failed to meet his burden.

14           Additionally, Judge, I would note for the record  
15 that Mr. Passarello indicated he had not received the victim  
16 impact statement on November 5th. That is in direct  
17 contradiction to an e-mail he sent to a legal assistant at the  
18 United States Attorney's Office that he had received our  
19 filings, which included two affidavits, yesterday.

20           Additionally, when Erick was provided by Agent  
21 Gamarra on November 5th, 2015, as noted in Agent Gamarra's  
22 affidavit, "The point of this meeting was to review the victim  
23 impact statement in its entirety to ensure that all of the  
24 answers were accurate." As stated in Agent Gamarra's sworn  
25 affidavit, which is uncontroverted, "At that point Erick



1 indicated that all of the answers on his victim impact  
2 statement were accurate, except one: The one in which he  
3 indicated that he had "not really been abused." And so he was  
4 able to answer that question in a way he felt was accurate.  
5 And he says, "that sometimes people think badly of me, perhaps  
6 because he is in jail because of me," because of the testimony  
7 that Erick gave at trial under oath which the defense chose  
8 not to cross-examine him. That was their strategic error, and  
9 they now don't get a second bite of the apple by not meeting  
10 their burden on the two issues that they brought before the  
11 Court today.

12 Thank you.

13 THE COURT: Mr. Passarello, do you have rebuttal?

14 MR. PASSARELLO: Just briefly, Your Honor.

15 First of all, I want to address what I said to this  
16 Court was that I did not receive what I believe to be a new  
17 victim impact statement taken by Agent Gamarra on  
18 November 4th, 2015. Attorney Larson, as she always likes to  
19 do, cleared that up. I guess there's not a new victim impact  
20 statement. But it's -- they had it, they hid it, and they got  
21 caught. And now they're backpedaling. That's what this  
22 argument is. They cheated and they got caught.

23 How anybody can look this Court in the eye and say  
24 a victim who says, "perhaps people think he abused me but he  
25 did not" is not material to a case where they say he abused

1     them is unbelievable. That clearly is material. And yes,  
2     Your Honor, I did -- what I have is the statement. That's my  
3     evidence. That's the statement. And it's your job and it's  
4     your sole discretion to determine whether or not that  
5     statement is and of itself material.

6             That's my evidence. They had it. I can show they  
7     had it. I can show they didn't disclose it. I can show all  
8     of that. But this case is about credibility. If I have a  
9     statement from somebody who says something different than what  
10    they said on the stand, how in Sam Hill is that not material?  
11    How can that be? How can that be?

12            This clearly is material evidence. This clearly  
13    should have -- what should have happened is on September 20th,  
14    they should have come into this court on the 21st in the  
15    morning and said, Judge, we got an issue with this statement.  
16    Here it is. I'm here to answer any questions you may have.  
17    Do what you will with it. They didn't. They didn't. And  
18    they didn't because they decided, "Nah, I'm not giving it to  
19    them. It's not material." It's not their call. I can't  
20    believe they come in here and say it's not material.

21            But anyway, Judge, I believe we've met our burden.  
22    It is a statement that contradicts -- and it's odd, isn't it,  
23    that Mr. Gamarra went on November 4th, 2015, and Erick assured  
24    him that every single answer in that victim witness impact  
25    statement was correct, except for the one statement I'm

1     alleging.

2             I have nothing further.

3             THE COURT: Counsel, anything further?

4             MS. LARSON: No, Judge.

5             THE COURT: All right. Just one moment.

6             (Off-the-record discussion between the Court and  
7     Law Clerk Savino.)

8             THE COURT: Attorney Larson, just so I'm certain as  
9     to what occurred back on September 20th, 2015, the victim  
10    impact statement was completed that day and signed by Erick.

11            Now, was it reviewed by you?

12            MS. LARSON: It was not, Judge.

13            THE COURT: Who reviewed it?

14            MS. LARSON: Judge, it was in Spanish. One of the  
15    things we pointed out with our memo was that Mr. Passarello  
16    erroneously asserts that the victim assistant specialist wrote  
17    it down in English. And at that point that was not the case.  
18    It was documented in Spanish. Erick did not write the  
19    statement. Erick did not read the statement. The questions  
20    were read to him.

21            The Court is very aware of the background of these  
22    young men. So the decision was made that the statements would  
23    be read to them, and their answers would be provided verbally  
24    and documented by Jacqueline Goldstein, and that's what  
25    happened.

1           They then had to be sent to the U.S. Attorney's  
2   Office for official translation. When they were translated  
3   into English I reviewed the victim impact statements. At that  
4   point was when that was determined there was an ambiguity with  
5   what he meant by "abuse." It's unclear. At that point Agent  
6   Gamarra, being fluent in Spanish as his affidavit attests to,  
7   went on that very day to talk to Erick, and this explanation  
8   was given --

9           THE COURT: Well, just wait for a moment. We  
10   started on September 20th.

11          MS. LARSON: That's correct, Judge.

12          THE COURT: Erick was interviewed and orally gave  
13   these answers; is that correct?

14          MS. LARSON: That's correct, Judge.

15          THE COURT: Then it was transcribed in Spanish on  
16   the victim impact statement?

17          MS. LARSON: That's correct, Judge.

18          THE COURT: And then he signed it?

19          MS. LARSON: That's correct.

20          THE COURT: And when did that process end?

21          MS. LARSON: That was in the evening hours of  
22   September 20th, Judge.

23          THE COURT: When did you first see the statement?

24          MS. LARSON: Judge, I believe that I saw it on  
25   September 22nd. However, while I want to be 100 percent clear

1 in everything that we've communicated to the Court, which is  
2 why in Carlos Gamarra's affidavit, we're saying it was the  
3 21st or the 22nd. The earliest it could have been would have  
4 been the afternoon of the 21st, after the jury was charged,  
5 because we were in court all morning and, in fact, returned to  
6 court for the charge after lunch. So there's no way that  
7 these statements would have been translated or reviewed prior  
8 to the afternoon or evening hours of the 21st. And I believe  
9 that they were first reviewed on the 22nd, which is when Agent  
10 Gamarra had the conversation with Erick clearing up this  
11 ambiguity.

12 THE COURT: Well, then the Homeland Security people  
13 were the ones who first became aware of the contents of this  
14 victim impact statement?

15 MS. LARSON: That's correct.

16 THE COURT: And did they report to you or to  
17 Attorney Haines -- and I'll let her speak for herself -- but  
18 if you know, that's fine. Did they report to you that it had  
19 this statement in there that Mr. Passarello is referring to?

20 MS. LARSON: Absolutely not, Judge. And as  
21 contained, again, in the sworn affidavit of Jackie Goldstein,  
22 based on the hundreds of hours she had spent with him -- with  
23 Erick -- as well as her hours and training and experience as a  
24 victim assistant specialist, she did not note anything unusual  
25 about Erick's response. She did not view it as a recantation.

1 She viewed it as being in conformity with what he had already  
2 said.

3 THE COURT: Well, regardless of how she viewed it,  
4 when did she become aware of it?

5 MS. LARSON: Well, Erick made the statements in her  
6 presence on the 20th, Judge. But I believe that your question  
7 was did she then communicate to the members of the prosecution  
8 team, and the answer is no.

9 THE COURT: When did you first learn about it?

10 MS. LARSON: When the English versions were  
11 provided. And, again, the earliest that could have been was  
12 the evening hours of -- afternoon, evening hours of the 21st.  
13 I believe it was the morning of the 22nd, but I can't say for  
14 100 percent certain, which is why the dates in the affidavit  
15 are as they are.

16 THE COURT: So it was presented to you in English?

17 MS. LARSON: That's correct, Judge.

18 THE COURT: Did you read it?

19 MS. LARSON: In English, Judge. My Spanish is not  
20 good enough to read the victim impact statements in Spanish.

21 THE COURT: And when you read that, did you not  
22 note that it at least could be Brady material?

23 MS. LARSON: Judge, I didn't know what Erick meant  
24 by that statement.

25 THE COURT: Well, regardless of what he meant --

1 often we don't know what people mean -- but it was written out  
2 clearly, as Mr. Passarello has read it today. Regardless what  
3 Erick meant, the fact that that had been stated and put on the  
4 paper, would that not be Brady material because it would be  
5 helpful to the defense at that point?

6 MS. LARSON: Well, while, again, the Court may find  
7 that it's favorable, I don't see that as Brady. I do not find  
8 that as exculpatory material. And I don't see it certainly as  
9 rising to the materiality aspects that would render it a Brady  
10 violation.

11 THE COURT: Well, let's not mix the fact of whether  
12 it's Brady with whether it's material; those are two separate  
13 issues.

14 I am asking you, Would you not agree that it  
15 certainly would appear to be favorable to the defense,  
16 regardless of what Erick believed it meant? I mean to me, it  
17 is pretty clear that this is favorable to the defense. I  
18 don't think there is -- I don't see how you can say it isn't  
19 favorable to the defense. It is.

20 Now, whether it is material is a separate issue,  
21 and that is why I told you to concentrate on that particular  
22 aspect of the Brady. But, quite frankly, I don't see how it  
23 could be read as anything other than favorable to the  
24 defendant, so I want to know when you knew about it.

25 MS. LARSON: Again, Judge, the earliest I would

1 have known was when it was translated into English. I cannot  
2 give the Court an exact time, which is why it's the 21st or  
3 the 22nd, and the conversation was with Erick immediately  
4 thereafter.

5 THE COURT: I don't know what Erick meant by that.  
6 You don't know what Erick meant by that. You now have his  
7 version of what he meant. But could not Mr. Passarello have  
8 used that in terms of "you said this, did you not?" Then he  
9 could explain what he meant.

10 But would that not be favorable to the defense?

11 MS. LARSON: At the point -- again, this was given  
12 after Erick's sworn testimony, after the parties had rested.  
13 Now, in the situation in which the Court is saying could  
14 Mr. Passarello have cross-examined him and said, Did you make  
15 what amounts to an inconsistent statement, Erick would have  
16 been able to say yes or no and given an explanation.

17 If, in fact, it was an inconsistent statement,  
18 we're talking about impeachment. Which, again, if this  
19 evidence is solely for impeachment it does not rise to the  
20 level of getting a new trial.

21 THE COURT: Well, again, you are going to the  
22 materiality issue. I am asking you about the responsibility  
23 of the prosecution to provide Brady material, not to view  
24 whether it would change the outcome of the trial. That is not  
25 the issue. The issue is should it not have been provided.



1 MS. LARSON: Judge, again, we immediately clarified  
2 this ambiguity. And because of that and because the content  
3 of the rest of the statement, which clearly indicated it was  
4 consistent with the fact that Erick had been victimized by the  
5 defendant, no, we did not view this as favorable information.  
6 We did not view it as Brady material.

7 We are aware of our obligations, and had we viewed  
8 it that way it would have been immediately produced. Had  
9 there been a recantation, had there been any sort of testimony  
10 or statements made to any member of the prosecution team which  
11 demonstrated an inconsistency in what Erick was saying then  
12 versus his sworn testimony, absolutely that would have been  
13 documented and turned over.

14 As this Court is aware, and as we just put on the  
15 record regarding the ROI, Number 79 of Ludin's recantation,  
16 that was documented and immediately turned over, consistent  
17 with our obligations.

18 This was not done to take a bullet out of  
19 Mr. Passarello's gun nor was it done to hide anything. There  
20 was no nefarious intent, period.

21 THE COURT: Well, please keep in mind, I am  
22 differentiating between whether for purposes of a new trial  
23 this is material. I separate that from whether or not this is  
24 Brady material or Giglio material, and I don't quite  
25 understand how you could not view this as favorable to the

1 defendant. Having said that, that doesn't answer the issue of  
2 whether there should be a new trial or not, which is a  
3 separate issue.

4 Attorney Haines, are you basically on the same page  
5 with Attorney Larson as to when you learned about this?

6 MS. HAINES: I am, Your Honor. I was present with  
7 her. Yes, Your Honor.

8 THE COURT: And you say that when this Homeland  
9 Security person went back and discussed this with Erick, that  
10 Erick clarified or changed his answer to that particular  
11 inquiry?

12 MS. LARSON: That's correct, Judge. As detailed in  
13 the affidavit of Carlos Gamarra in Paragraphs 10 and 11, this  
14 details when the issue was first brought to Agent Gamarra's  
15 attention, that he immediately went to speak with Erick, asked  
16 him what did he mean when he said, That perhaps people think  
17 he was "really abused," and perhaps that -- and that's not the  
18 case. He was asked what he meant by that.

19 Erick gave the explanation, as he had many times,  
20 and consistent with Jacqueline Goldstein's understanding, He  
21 did not penetrate me, as he had with the other boys. Abuse  
22 means penetration, consistent with the way the other boys  
23 viewed it, so therefore, he didn't abuse me.

24 As Carlos Gamarra detailed in that affidavit in  
25 Paragraph 11 when it was explained to him that in the U.S. we

1 consider abuse to include touching of the genitals, Erick said  
2 he did not know that. He said he didn't understand, and under  
3 that definition yes, he was abused. At that point, that  
4 information was immediately relayed back to the case agent and  
5 the other members of the prosecution team.

6 THE COURT: Mr. Passarello, anything further?

7 MR. PASSARELLO: No, Your Honor.

8 THE COURT: Attorney Larson or Attorney Haines,  
9 anything further?

10 MS. LARSON: No, Judge.

11 MS. HAINES: No, Your Honor.

12 THE COURT: Then do either of you have any evidence  
13 to present as opposed to oral argument?

14 MS. HAINES: Your Honor, we have attached as  
15 government exhibits onto our initial response, as well as our  
16 supplemental response, the affidavits that have been referred  
17 to here today of Jacqueline Goldstein and Special Agent  
18 Gamarra.

19 If the Court would like a copy of those appended to  
20 this proceeding as Government Exhibit Number 1 and Government  
21 Exhibit Number 2 we would be happy, or if the Court is fine  
22 with just using what has been attached to the previous filings  
23 of the United States, we're happy to do whatever the Court  
24 would request in this proceeding.

25 THE COURT: Well, documents that have already been

1 docketed as a part of pleadings and responses and motions need  
2 not be presented again today.

3 MS. HAINES: We would ask for them to be  
4 incorporated herein then.

5 THE COURT: All right. Well, I am not going to  
6 rule from the bench on this. I would like to analyze it  
7 thoroughly before coming to a conclusion, and we will do that.  
8 Then depending on what the decision is, we will schedule  
9 further proceedings in accordance with that finding.

10 We will be in recess until call of Court.

11 (Proceedings concluded at 10:55 a.m.)

12 \* \* \*

13

14 CERTIFICATE OF OFFICIAL REPORTER

15

16 I, Kimberly K. Spangler, Federal Official Court  
17 Reporter, in and for the United States District Court for the  
18 Western District of Pennsylvania, do hereby certify that  
19 pursuant to Section 753, Title 28, United States Code, that  
20 the foregoing is a true and correct transcript of the  
21 stenographically reported proceedings held in the  
22 above-entitled matter, and that the transcript page format is  
23 in conformance with the regulations of the Judicial Conference  
24 of the United States.

20

21 Dated this \_\_\_\_ day of \_\_\_\_\_ 2016

22

22

23

24 KIMBERLY RUSHLOW SPANGLER, RPR, RMR  
25 FEDERAL OFFICIAL COURT REPORTER

25